United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1330

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1330

B
P/S

UNITED STATES OF AMERICA,

Appellee,

v.

GLENN WALTER ALEXANDER DeLaMOTTE,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT DeLaMOTTE

Jacob D. Zeldes
Alfred J. Jennings, Jr.

Attorneys for Defendant-Appellant
Glenn Walter Alexander DeLaMotte

ZELDES, NEEDLE & COOPER
ATTORNEYS AT LAW
LAFAYETTE PLAZA TOWER
333 STATE STREET
BRIDGEPORT, CONNECTICUT 06604

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Cases cont'd. Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

The Statement of Issues Presented for Review

1. Whether appellant is entitled to a new trial on the ground of newly discovered evidence relating to:

A. his contention that John David Troglen actually committed and has confessed to the role in the crime which appellant was convicted of, and

B. the prolonged liberty enjoyed by convicted co-appellant and chief prosecution witness at trial, Charles Jackson, indicating circumstantially an undisclosed promise or understanding of benefit to Mr. Jackson in return for his trial testimony.

2. Whether the instruction to the jury by the trial Court given during the testimony of chief prosecution witness Charles Jackson denied appellant DeLaMotte due process of law and effective representation of counsel.

3. Whether appellant DeLaMotte was illegally indicted on the basis of hearsay evidence.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1330

UNITED STATES OF AMERICA,

Appellee,

v.

GLENN WALTER ALEXANDER DeLaMOTTE,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT DeLaMOTTE

The Statement of the Case

This is an in forma pauperis appeal from an order of the District Court of the District of Connecticut (Zampano, J.), denying appellant's motion for a new trial on the ground of newly discovered evidence under Rule 33, Federal Rules of Criminal Procedure and on certain other claims of law made by appellant in the District Court under 28 U.S.C. §2255. Because some of the issues ruled on by the District Court and presented for review in this Court relate back to appellant's 1969 trial and 1966

indictment, a more extensive than usual presentation of the background of the case is necessary.

On April 16, 1969, appellant was convicted on one count of inter-state transportation of a kidnapped person, in violation of 18 U.S.C. §1201(a), and one count of inter-state transportation of a stolen motor vehicle, in violation of 18 U.S.C. §2312. On May 12, 1969 he received the following sentence:

> "Defendant is committed to the custody of Attorney General or his authorized representative for imprisonment for a period of 30 years on Count 1. Order this sentence be served consecutively to sentence hereto imposed by Federal Court in New Jersey. On Count two, 5 years imprisonment and in addition pay maximum fine of $5,000. This is a committed fine to be paid within 30 days. The sentence on Count two is to run concurrently with the sentence imposed on Count one. Court recommends incarceration at Leavenworth, Kansas. Court orders Federal Bureau of Prisons that defendant DeLaMotte not be incarcerated with co-defendants...."

Mr. DeLaMotte appealed his conviction to this Court which affirmed on November 10, 1970. United States v. Glenn Walter Alexander DeLaMotte, 434 F.2d 289 (2 Cir. 1970). The judgment became final on February 2, 1971 when the United States Supreme Court denied certiorari. Glenn DeLaMotte v. United States, 401 U.S. 921 (1971).

By his timely[1] Motion for New Trial dated March 8, 1971 and filed in forma pauperis on June 25, 1971, appellant DeLaMotte

---

1. Within two years after final judgment per Rule 33, Federal Rules of Criminal Procedure.

requested a new trial under Rule 33, Federal Rules of Criminal Procedure, on the grounds of newly discovered evidence and on the further ground that his conviction was based entirely on the perjured testimony of co-defendant Charles Jackson. The undersigned counsel were appointed to represent him in conjunction with that motion. Following the denial of defendant's request to grant the motion for new trial without the need for an evidentiary hearing, a hearing was held before the District Court with testimony taken on June 14, 1972 and March 6, 1973. In the absence of Government objection (6/14/72 Tr. 4)[2] and in accordance with previous notifications to the Government and the Court (6/14/72 Tr. 9), appellant DeLaMotte filed a substituted motion for new trial under Rule 33 and also under 28 U.S.C. §2255, which substituted motion claimed a new trial on the following grounds:

1. Newly discovered evidence consisting of: (a) the confession of John David Troglen that he participated in this crime by driving the hijacked truck from Milford, Connecticut

2. Under the provisions of Rule 30(f), Federal Rules of Appellate Procedure as supplemented by Rule 30(2) of this Court, appellant, proceeding in forma pauperis, is presenting this appeal with an appendix consisting solely of the opinion rendered by the District Court denying his motion for new trial. Three copies of the transcripts of evidentiary hearing before the District Court on June 14, 1972 and March 6, 1973 are also submitted. References to the pages of the appendix (District Court opinion) are indicated as (a); references to other portions of the record on appeal are indicated with appropriate abbreviations in parenthesis.

to New York City (which role in the crime appellant DeLaMotte was charged with and convicted of), and the testimony of Patrick J. O'Shea confirming that John David Troglen was the person who arrived in New York City as the driver of the hijacked truck; (b) the out-of-court statements of co-defendant John Walsh absolving appellant DeLaMotte from any involvement with the commission of this crime; and (c) the post-trial facts concerning the at-liberty status of convicted co-defendant and principal prosecution witness Charles Jackson, which facts tend to show that the full extent of promises made to him in return for his testimony were not disclosed at trial.

2. The erroneous instruction to the jury by the trial Court given during the testimony of Charles Jackson which misled the jury into believing that the District Court could not order the liberty of Charles Jackson pending the outcome of his appeal, although in fact Charles Jackson was allowed to be at liberty on a non-surety bond per order of the District Court shortly after the DeLaMotte trial ended, which misconception, under the particular circumstances of the DeLaMotte trial, denied appellant due process of law and effective representation of counsel.

3. The erroneous charge to the jury at the conclusion of the evidence on the subject of accomplice testimony, which charge, under the particular circumstances of this case, denied appellant

due process of law as guaranteed by the Fifth Amendment; and

4. The indictment of appellant on October 10, 1966 was based entirely on the impermissible use of hearsay evidence.

The District Court denied the motion for new trial in all respects (5a). Appellant seeks review in this Court of the District Court's ruling on the three issues set forth in the Statement of Issues Presented for Review, supra. In order to understand those issues in proper perspective, the following background material of this criminal proceeding is presented.

A. Arrest And Indictment

The crime involved occurred on September 2, 1966, when a loaded tractor-trailer truck leaving the Schick Razor Company plant in Milford, Connecticut was hijacked. It is undisputed that co-defendant Charles Jackson, a Negro, entered the cab of the truck while armed with a pistol and forced the driver, John Grant, into an automobile driven by co-defendant John Walsh, a Caucasian. Walsh and Jackson then took the truck driver, Grant, by automobile to a wooded area near Alpine, New Jersey, where they bound him to a tree. He was able to free himself after their departure and reported the hijacking to police in New Jersey. When Charles Jackson had forced the truck driver to leave the cab of the truck, another person participating in the criminal scheme entered the cab of the truck from the opposite

side and drove it away. The truck was later found empty and abandoned in New York City.

Co-defendant Charles Jackson was arrested by FBI agents in New York City on September 13, 1966, and, on that date, gave FBI agents an oral confession admitting his role in the hijacking and also implicating John Walsh and Glenn DeLaMotte as the other participants.[3] Jackson's confession was then reduced to writing, but he refused to sign it. (4/3/69 Tr. 77-143).

Glenn DeLaMotte was arrested on September 14, 1966 by Federal Agents in New Jersey. At no time before or after his arrest has he made any statement admitting any involvement whatsoever with the hijacking of September 2, 1966. Co-defendant John Walsh was also arrested on September 14, 1966. (4/3/69 Tr. 187). After his arrest he confessed to his role in the hijacking to the FBI. (6/14/72 Tr. 96). It was an oral confession reduced to writing by the FBI, which writing Walsh refused to sign (6/14/72 Tr. 97) (4/3/69 Tr. 188) Walsh's confession is mentioned in the record insofar as it formed the basis of a motion for separate trials filed jointly by counsel for defendants Walsh and DeLaMotte and the United States Attorney, which motion was granted on September 30, 1968.

3. On November 4, 1966, Jackson moved to suppress this oral confession, which motion was denied on June 19, 1968.

Jackson, Walsh and DeLaMotte were indicted by the grand jury by an indictment filed October 10, 1966. The undersigned counsel announced orally at the hearing of June 14, 1972 (6/14/72 Tr. 178) and on March 6, 1973 (3/6/73 Tr. 189-192) that a claim for new trial under 28 U.S.C. §2255 would be made on behalf of Mr. DeLaMotte because of the use of hearsay evidence against him before the grand jury. The Government agreed at the hearing to review the grand jury transcript and to advise defense counsel of the nature of the evidence submitted to the grand jury. (3/6/73 Tr. 190; 253). Thereafter, the Assistant U.S. Attorney handling this case sent to defense counsel a copy of a motion filed on November 18, 1966 on behalf of co-defendant John Albert Walsh, Jr. to have the grand jury minutes transcribed. On December 5, 1966, Judge Timbers ruled on that motion by entering the following order:

> "Motion denied government having advised Court that no stenographer was present. The Clerk of this Court is ordered to unseal and disclose to counsel, 14 days before trial, the yellow sheet or sheets comprising the Grand Jury minutes, after which they are ordered re-impounded."

Based on that prior order of Judge Timbers, appellant DeLaMotte moved on April 12, 1973 for disclosure of the yellow sheet or sheets comprising the grand jury minutes, which motion was granted, absent Government objection, on April 23, 1973. By letters received from the Clerk of the District Court under dates of April 26, 1973 and May 4, 1973, it was reported that

no grand jury minutes for October 10, 1966 can be located in the Clerk's Office or in the Federal Records Center in Waltham, Massachusetts. Copies of those letters are included in the Record on Appeal (Supplement to Record on Appeal, Document No. 2, Ex. A and B). It appears, then, that there is no record whatsoever as to the nature and source of the evidence submitted to the grand jury on October 10, 1966.

B. Trial Proceedings

Although the pending appeal involves no party defendant other than Glenn Walter Alexander DeLaMotte, in order to fully comprehend the claims made at this time on his behalf it is also necessary to review briefly some aspects of the trial level proceedings against co-defendants Jackson and Walsh.

Trials of all three defendants were delayed when the District Court dismissed one count (the kidnapping count) of the indictment against each defendant on constitutional grounds. United States v. Jackson, 262 F.Supp. 716 (D. Conn. 1967). The Government appealed this dismissal and the Supreme Court reinstated the dismissed count against each defendant by invalidating the death penalty provision of the kidnapping statutute, which provision was the root of the claim of unconstitutionality. United States v. Jackson, 390 U.S. 570 (1968).

Thereafter Charles Jackson was convicted of both counts

by a jury on July 3, 1968. He did not testify in his own defense. In fact, the first time he testified at any proceeding concerning the crime of September 2, 1966 was his testimony for the Government at the DeLaMotte trial in April of 1969. (4/2/69 Tr. 15). Immediately upon Jackson's conviction his bond was increased from $10,000 to $50,000, although he had been in custody throughout his trial at which he was represented by appointed counsel and was authorized to receive daily transcripts at Government expense because of his indigence. He remained in custody after the trial. On his own motion, his sentencing was continued until November 29, 1968. On that date, he was sentenced to 25 years on count one and 5 years on count two, to run concurrently. Both sentences were imposed under 18 U.S.C. §4208(a)(2), making Jackson eligible for parole whenever the Board of Parole might determine.

On December 5, 1968, Charles Jackson's notice of appeal was filed. On December 16, 1968, he moved in the District Court for a modification of his sentence and to be admitted to bail, which motions were denied by the District Court (Timbers, J.) 297 F.Supp. 601 (1969). The docket sheet also shows that on January 31, 1969 a Motion for Reconsideration of Bond Pending Appeal, filed on behalf of Mr. Jackson, was denied by Judge Timbers.

John A. Walsh, Jr. changed his plea on the first count (the kidnapping count) to guilty on October 15, 1968. On December 2,

1968, he was sentenced on that first count to 22 years under 18 U.S.C. §4208(a)(2). The second count was dismissed. Mr. Walsh did not testify at the Jackson trial. At the DeLaMotte trial he was called as a Government witness in the absence of the jury and invoked his Fifth Amendment as to all substantive questions put to him by the Government (4/3/69 Tr. 187, 188) and the defense (4/3/69 Tr. 193, 194). The only testimony offered at any time by John Walsh was given at the hearing of June 14, 1972 on DeLaMotte's motion for new trial. (6/14/72 Tr. 74-101). That testimony and Mr. Walsh's several prior out-of-court statements will be discussed in detail as part of appellant DeLaMotte's claim of newly discovered evidence.

The DeLaMotte trial jury commenced on April 1, 1969 before Judge Timbers and concluded on April 16, 1969 with his conviction on both counts of the indictment. He did not testify in his own defense. He explained his failure to testify at trial during his testimony at the hearing on the motion for new trial:

> "Q. Would you tell his Honor why you did not testify.
> A. My attorney at the time said--felt it was best that I didn't.
> Q. Did you have any discussions with him--
> A. Yes.
> Q. --about this?
> A. Yes.
> Q. And was there something that had recently happened?

A. Yes. He had said that my--I just had a prior conviction[4] and he felt it best that I don't take the stand.
Q. And you acquiesced in that decision that he made? You agreed with that decision?
A. Well, as he was my attorney and I didn't know much about the law, I did agree."
(6/14/72 Tr. 117).

At the June 14, 1972 hearing on the motion for new trial DeLaMotte did testify and categorically denied any involvement with the hijacking of September 2, 1966. (6/14/72 Tr. 113-114, 117-118)

Several eyewitnesses to the hijacking testified at the DeLaMotte trial. The kidnapped truck driver, John Grant, readily identified Charles Jackson, (4/11/69 Tr. 231) and John Walsh (4/11/69 Tr. 288). He was totally unable to identify Mr. DeLaMotte and, in fact, testified when asked if he could identify DeLaMotte, "I never saw him." (4/11/69 Tr. 292). Another eyewitness, Walter Valites of Southport, Connecticut testified. He was an employee of the Schick Razor Company enroute to work at the Shick plant in Milford in his automobile when he observed the truck stopping at a stop sign near the plant and a "paunchy Negro" trotting after it. He also observed two other individuals seated nearby in a green Chrysler automobile. (4/7/69 Tr. 112-114). He could not identify the Negro he saw. (4/7/69 Tr. 115). He was

4. The "prior conviction" referred to a Federal criminal case in the District Court for New Jersey where the offense had occurred after the September 2, 1966 hijacking, but trial and conviction in New Jersey preceded this trial in the District of Connecticut. See 6/14/72 Tr. 121-123 for a full explanation of defendant's criminal record.

able to describe somewhat the two individuals he observed sitting in the green Chrysler, but testified that he could not identify them. (4/7/69 Tr. 115). He described them as "dark complexioned" (4/10/69 Tr. 17) and could not identify appellant when Mr. DeLaMotte stood before him in the courtroom. (4/10/69 Tr. 18) In fact, he testified that appellant DeLaMotte was not one of the men he saw in the car. (4/10/69 Tr. 27-29) Leslie Buswell of Stratford, Connecticut observed the hijacking from the window of his place of employment on the Boston Post Road in Milford. (4/10/69 Tr. 117-119) He tesitifed that he saw a man get out of a following car and walk forward and enter the cab of the hijacked truck on the left, or driver's side (the role in the crime allegedly performed by DeLaMotte) just after the truck driver and another passenger got out of the cab on the right, or passenger's, side and started to walk back toward the car (4/10/69 Tr. 119); and that the man who entered the truck drove it away. (4/10/69 Tr. 141) He testified at first that he could not state whether nor not the man who entered the truck was Negro or white (4/10/69 Tr. 119), but later, after having his memory refreshed by his prior statement, testified that: "I would say he was white." (4/10/69 Tr. 133) He could not identify Mr. DeLaMotte in the courtroom as the man he saw entering the cab of the truck. (4/10/69 Tr. 145) All three disinterested eyewitnesses (Grant, Valites, and Buswell), then, were unable to identify appellant DeLaMotte as a participant in this crime.

The only evidence linking DeLaMotte to the hijacking of September 2, 1966 was the testimony of co-defendant Charles Jackson who, at the time of his testimony, had an appeal pending in this Court for his conviction and 25 year sentence under 18 U.S.C. §4208(a)(2). The crucial nature of the Jackson testimony was noted by Judge Smith, writing for this Court in affirming DeLaMotte's conviction on direct appeal:

> "The only evidence implicating appellant was that of Jackson who appeared as a witness for the government after he had been convicted in a jury trial of the same crimes and sentenced to 25 years on the kidnapping count and 5 years on the Dyer Act count." United States v. DeLaMotte, 434 F.2d 289, 291 (2 Cir. 1970).

The testimony, and particularly the cross-examination of Charles Jackson, was the crucial aspect of the DeLaMotte trial. Mr. Jackson admitted his own role in the crime (4/1/69 Tr. 5-15), his conviction and sentence (4/1/69 Tr. 42), and then-pending appeal (4/2/69 Tr. 64). He was questioned extensively by the Government and the defense as to promises made to him by the Government in return for his testifying for the prosecution. On direct examination, he testified:

> "Q. Mr. Jackson, I believe the question pending at this time is what, if any, representation I have made to you concerning your liberty or lack of liberty while your case is pending on appeal.
> A. You promised bond pending appeal if I was to testify." (4/2/69 Tr. 70).

Mr. Jackson explained further:

"A. Well I was promised bond if I was to take the stand.
Q. What do you mean by bond?
A. An appeal bond.
Q. Did I say the condition of the bond? What type of amount of bond?
A. No, you didn't say the amount." (4/2/69 Tr. 71)

At that point in the trial, Mr. Jackson's direct examination was interrupted by Judge Timbers who made the following statement to the jury:

"With respect to this bond question regardless of what any witness says or believes he understands, or regardless of position of counsel on either side on the matter of bond pending appeal, is a matter exclusively for the Court. First, the District Court, which fixes bond or denies bond pending appeal, depending upon the circumstances and findings of the Court. Secondly, once the appeal is taken, it is the exclusive jurisdiction, with respect to the matter of bond appeal, of the Appellate Court. In this case, the United States Court of Appeals for the Second Circuit. What I say to you is not intended in any way to express my view or comment one way or the other on the witness's understanding or lack of understanding on this issue. I think I would be foolish to sit here and let any misunderstanding be continued any further. This matter of bond, in short, is solely for the Court, this Court, until the appeal is taken to the Court of Appeals or, eventually, the Supreme Court of the United States, depending upon which Court it is. This Court no longer has jurisdiction. Now, whatever promises may be made, or whatever applications may be made by the Defendant to his counsel, are entirely a different matter. The ultimate determination is one for the Court. I don't want any misunderstanding, and I am sure both Mr. Brown and Mr. Sherbacow recognize that and would not want you to be mislead on that any more than I want you to be mislead." (emphasis added) (4/2/69 Tr. 71-73).

Continuing on direct examination, Mr. Jackson testified that a further promise had been made to him in the event the Court of Appeals should affirm his sentence and conviction. Omitting objections and colloquy of counsel, that testimony will be set forth verbatim. The clear import of the testimony was that if this Court affirmed his conviction, Mr. Jackson would begin to serve his twenty-five year sentence and then, at some point, seek relief from the Parole Board:

> "Q. Were there any other statements that I made to you concerning the appeal, either what position the Government would take in respect to your conviction on the kidnapping charge?
> A. No.
> Q. Did we discuss at all what, if anything, I would say on the behalf of the Government if your conviction ordered you to serve your sentence?
> A. No.
> Q. Did I make any statements to you concerning the amount of your sentence if your conviction was affirmed? Did I make any statement concerning the twenty-five year sentence?
> A. You said you would write a letter of recommendation for me for parole, I believe.
> Q. To the Parole Board?
> A. Yes.
> Q. Did I tell you what I would say or what I would put in that letter of recommendation to the Parole Board?
> A. No, you didn't.
> Q. Did I say anything concerning advising the Parole Board about the fact of your testimony in this proceeding?
> A. No, I don't believe so.
> Q. In other words, did I say it or not? Your answer was, 'I don't believe so.'
> * * * *
> Q. Did I say anything to the effect of what I would tell the Parole Board about your having testified in this case?

A. Yes.
Q. Do you remember what the conversation was that I had with you?
A. You told me that you would write a letter advising the Parole Board to have leniency on my behalf and that's about all I can remember.
Q. Did I have any discussion with you concerning what your testimony would be in this proceeding?
A. Yes.
* * * *
Q. Mr. Jackson, is it a correct statement that you are aware that your conviction may possibly be affirmed or may possibly be reversed by the Court of Appeals?
* * * *
Q. To rephrase the question, Mr. Jackson, are you aware that the Court may either affirm or reverse your conviction?
A. Yes.
Q. Now, in the event--Have you discussed a reduction of sentence with your attorney?
A. Yes.
Q. Have I made any representation to you concerning any motions to reduce which may be filed?
A. Yes.
Q. What was that statement by myself?
A. Well, you just said that you would file a motion or make a recommendation for me on your behalf.
Q. That would mean what?
A. That I would get a reduction of sentence.
* * * *
Q. And that I would so recommend?
A. Yes." (4/2/69 Tr. 74-77)

C. Post Trial Events

As previously mentioned, co-defendant Charles Jackson filed his appeal to this Court on December 5, 1968, and was twice denied bond on appeal. He testified for the Government in the DeLaMotte trial, which concluded with conviction on both counts on April 16, 1969. Despite Judge Timbers' admonition to the jury

that the District Court no longer had jurisdiction to grant Mr. Jackson bond on appeal, exactly one week after the conclusion of the DeLaMotte trial, on April 23, 1969 the following endorsement was entered on Defendant Jackson's Motion for Rehearing and Reconsideration of the Defendant Jackson's Motion to Admit Him to Bail:

> "4/23/69. A hearing in open court on this motion having been heard at Bridgeport on 4/21/69, the undersigned entered an 'ORDER SPECIFYING CONDITIONS OF RELEASE PENDING APPEAL' on 4/23/69, the undersigned approved a $25,000 appearance bond, releasing defendant Jackson pending appeal (Timbers, J)."

A copy of the full Order Specifying Conditions of Release Pending Appeal filed April 23, 1969 is included in the Record on Appeal (Supplement to Record on Appeal, Document No. 2 Ex. C). That order makes it clear that Mr. Jackson was released on a non-cash, non-surety bond in the amount of $25,000, signed by himself, an indigent. He was released to the custody of a private individual in Brooklyn, New York, subject to certain specified conditions, including conditions that he report weekly to a Probation Office in Brooklyn; that he keep the Clerk advised of his whereabouts; and that he prosecute his appeal to this Court with diligence. The order was signed by Mr. Jackson, his appointed trial counsel, his appointed appellate counsel, counsel for the Government and by Judge Timbers as Chief Judge of the United States District Court.

The order of April 23, 1969 is in sharp contrast with the order entered less than four months earlier denying Charles Jackson's first request for bond pending appeal. In his Memorandum of Decision and Order That Defendant Jackson Be Held Without Bond Pending Appeal filed January 6, 1969 Judge Timbers concluded:

> "The record of sworn, uncontroverted testimony in this case amply demonstrates that Jackson poses a distinct danger to other persons and to the community. The very crimes of which he has been convicted involved the use by him of a deadly weapon on hijacking a truck, kidnaping and transporting his victim at gunpoint from Connecticut to New Jersey, tying his victim to trees and leaving him to die--for aught Jackson knew when he left him.
>
> "In addition to the existnece of a risk of danger ground of the instant order that defendant be held without bond pending appeal, the instant order also is based on the eixstence of a risk of flight. The Court believes that the fact that Jackson faces a 25 year sentence of imprisonment is alone sufficient to justify the risk of flight ground of the instant order. In any event, detention pending appeal is authorized on either or both grounds by 18 U.S.C. §3148.
>
> "In accordance with this Court's policy of denying bail pending sentence or appeal only in an extraordinary case, the Court holds that this is just such an extraordinary case." 297 F.Supp. at 603.

Despite the conditions of his release pending appeal, Charles Jackson did not keep the Court or the government advised of his whereabouts, nor did he prosecute his appeal with diligence. More than three years after his release on bond pending appeal Jackson's appeal was dismissed for frivolousness on January 18, 1972 on the

motion of the government following Jackson's appointed appellate counsel's motion to withdraw his appearance. A copy of the order dismissing the appeal is in the record (Supplement to Record on Appeal, Document No. 2, Ex. D). Some six months after Jackson's appeal was dismissed, the government announced as a "curious situation" that Mr. Jackson was still at liberty. (6/14/72 Tr. 8) More than fourteen months after the dismissal of the Jackson appeal the government announced that he was not in federal custody and the government did not know where he was. (3/6/73 Tr. 182-183). A copy of a letter of March 1, 1973 from the Assistant Director of the Bureau of Prisons to the United States Attorney was marked into evidence at the hearing of March 6, 1973 as Defendant's Exhibit 6. (Second Supplement to Record on Appeal, Ex. 6). The letter confirms that neither the Bureau of Prisons nor the Probation Department knew of Jackson's whereabouts on that date. In July of 1974, the Assistant United States Attorney in charge of this case forwarded a copy of Mr. Jackson's FBI identification record in accordance with the agreement of counsel reported to the Court (6/14/72 Tr. 4). That identification record (Supplement to Record on Appeal, Document 2, Ex. E) shows that Charles Jackson was arrested on March 11, 1974 and was incarcerated at a State of New York correctional facility on a charge of manslaughter in the first degree and felony murder. He was apparently not taken into

federal custody at any time after his release on bond pending appeal on April 23, 1969. It appears that he remained at liberty for 26 months after his appeal was dismissed until his arrest on an unrelated charge by New York State authorities.

Appellant DeLaMotte was sentenced for his conviction in this case on May 12, 1969. He has been in continuous federal custody since the date of his conviction on April 19, 1969. He is currently incarcerated at the United States Penitentiary at Marion, Illinois. (6/14/72 Tr. 113). He first met John David Troglen, a fellow inmate at Marion, in or about the fall of 1970. (6/14/72 Tr. 26, 114). At that meeting in the presence of several other inmates Mr. Troglen advised Mr. DeLaMotte that he had driven the hijacked truck from Milford, Connecticut to New York City--the very act that DeLaMotte had been convicted of. (6/14/72 Tr. 114-115). On January 26, 1971 Mr. Troglen executed an affidavit confessing his role in this crime and gave a copy to defendant DeLaMotte. (6/14/72 Tr. 17, 18). While incarcerated at Marion, Illinois appellant also met fellow inmate Armando Sacassus. In the period between June, 1969 and March, 1970 Mr. Sacassus related to Mr. DeLaMotte his recollection of a conversation which had occurred between Sacassus and co-defendant John Walsh in the Federal Detention Center on West Street in New York City between October 3 and October 11, 1966. On March 6, 1970 Mr. Sacassus executed an affidavit concerning

that conversation and gave a copy to Mr. DeLaMotte. (6/14/72 Tr. 108).

On June 25, 1971 Mr. DeLaMotte filed his Motion for New Trial Under Rule 33 and his Motion to Proceed in Forma Pauperis. Copies of the Troglen and Sacassus affidavits were attached to the motions. The motions were referred to Judge Timbers as the judge who had presided at the trial. On June 25, 1971 Judge Timbers entered an Order to Show Cause requiring the government to file a written response showing cause why the motions should not be granted or why an evidentiary hearing should not be held thereon. The government responded on July 26, 1971 by filing a request for an evidentiary hearing. On October 1, 1971 the undersigned counsel were appointed to represent Mr. DeLaMotte, and filed a Request to Grant his Motion for New Trial Without the need for an Evidentiary Hearing on November 2, 1971 which motion was heard by the Court (Zampano, J.) on November 23, 1971 and was denied on January 25, 1972 with an order that an evidentiary hearing be scheduled. (Judge Timbers had by this time been elevated to the Court of Appeals).

Following preliminary discovery proceedings the evidence regarding the motion for new trial was heard on June 14, 1972 and March 6, 1973. Witnesses for the defendant included, inter alia,

John David Troglen,[5] Armando Sacassus, and John Walsh. Transcripts of the entire hearing have been prepared and filed and are being submitted in triplicate with this brief.

5. John David Troglen was indicted on July 12, 1972 for perjury in that he allegedly gave false testimony at the DeLaMotte hearing of June 14, 1972. (Criminal Action No. H-317). The indictment was dismissed on October 25, 1973 for the Government's failure to be ready for trial within the period specified in the District of Connecticut Plan for Achieving Prompt Disposition of Criminal Cases.

I. APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF NEWLY DISCOVERED EVIDENCE.

By his timely pro-se motion for new trial filed in forma pauperis under Rule 33, Federal Rules of Criminal Procedure, as later expanded by a substituted motion seeking additional relief under 28 U.S.C. §2255, appellant seeks a new trial on the ground of newly discovered evidence. The substance of the newly discovered evidence was presented to the District Court by the affidavits submitted with appellant's original pro-se motion and by testimony and exhibits presented at the hearing on the motion. Briefy stated, appellant relies upon the following newly discovered evidence in support of his claim for a new trial under Rule 33:

1. The sworn written confession (annexed to the original motion for new trial filed June 25, 1971) (Record on Appeal, Document No. 1) and the confession in open court (6/14/72 Tr. 19-26) of John David Troglen that he participated in this crime by driving the hijacked truck from Milford, Connecticut to New York City, which role in the crime Glenn DeLaMotte was charged with and convicted of, as confirmed by the statement of Jewell Wesley Walters. (Second Supplement to Record on Appeal, Ex. 8);

2. The out-of-court statements of co-defendant John Walsh absolving appellant DeLaMotte from any involvement with the commission of the crime, as confirmed by the testimony of Armando Sacassus and Thomas Skinner;

3. The affidavit and testimony of Patrick J. O'Shea confirming that John David Troglen and not appellant DeLaMotte was the person who arrived in New York City as the driver of the hijacked truck; and

4. The strong circumstantial evidence that co-defendant and chief prosecution witness Charles Jackson had been promised a reward of considerably greater benefit to himself than the agreement disclosed by Jackson or by the Government, which circumstantial evidence consists of the undisputed facts that Jackson, following his testimony for the prosecution against appellant DeLaMotte, was allowed to remain at liberty on a non-surety bond, for 26 months after his own appeal was dismissed and that he was not, at any time, taken into federal custody to begin serving his twenty five year sentence for his own participation in this crime.

The first three enumerated items all relate to the claim that John David Troglen, and not appellant DeLaMotte, drove the hijacked truck from Milford, Connecticut to New York City and will be referred to collectively as the "Troglen evidence" as it was in the District Court. The "Troglen evidence" part of the claim does not involve any claim aspect of prosecutorial suppression. The District Court found that the Troglen evidence was "unworthy of belief" (3a.) and rejected it, thereby denying the motion for new trial premised on that evidence. Appellant seeks reversal of the District Court's finding as being inconsistent with the clear weight of the newly discovered evidence.

The fourth item enumerated above was referred to in the District Court as the Jackson evidence and relates to appellant's claim that the full understanding or "deal" between the Government and its chief witness Charles Jackson was not disclosed. Appellant relies on the hindsight of subsequent events in the most unusual benefit of lengthy freedom enjoyed by Mr. Jackson after the affirmance of his conviction. The District Court also

rejected this claim because it found it to be "mere speculation" (4a) in face of the Government's denials that Mr. Jackson's liberty resulted from any prearranged understanding. In that finding, also, appellant seeks reversal of the District Court.

Because the Jackson evidence involves the concept of prosecutorial failure to disclose while the Troglen evidence does not they must be separately discussed and evaluated.

A. The Troglen Evidence

John David Troglen first met Glenn DeLaMotte in the summer or fall of 1970--more than a year after the conclusion of the DeLaMotte trial--at the United States Penitentiary at Marion, Illinois. (6/14/72 Tr. 114). In the presence of several other inmates Troglen admitted to DeLaMotte that he had been involved in the crime of which DeLaMotte had been convicted. (6/14/72 Tr. 115). Thereafter on January 26, 1971 Mr. Troglen freely and voluntarily executed the affidavit annexed to appellant's original motion for new trial (6/14/72 Tr. 17, 18). In that affidavit John David Troglen specifically confessed to the truck-driver role in the September 2, 1966 hijacking and completely exonerated DeLaMotte from any role whatsoever in that crime:

> "I, John David Troglen, depose and confess to the following, On September 2, 1966, I participated,

> with three (3) other men in the hijacking of a Tractor Trailer, property of the Shick Razor Plant, of Milford, Connecticut. The cargo in the trailer was razor blades....
> At this point I entered the truck, drove on Post Road until I entered the Thruway and proceeded to drive to New York City....
> It was I, not Glenn DeLaMotte, along with LaMonchia, Jackson, and Walsh who hijacked the Truck Trailer and its cargo of razor blades on September 2, 1966. Said property belonging to the Shick Razor Co. of Milford, Conn." (Record on Appeal, Document No. 1).

At the time John David Troglen signed this affidavit on January 26, 1971 at Marion, Illinois, there were more than seven months remaining before the running of the five year statute of limitations for prosecutions for the hijacking of September 2, 1966. 18 U.S.C. §3282.

As clarified by Mr. Troglen's testimony, his mention of "LaMonchia" in the above-quoted portion of his affidavit of January 26, 1971 referred tc one Sam LaMoncha who was not an actual participant in the hijacking, but rather was the one who arranged for Mr. Troglen's participation in the crime and put him in touch with Jackson and Walsh, the other participants. (6/14/72 Tr. 20-22, 27-32).

Mr. Troglen repeated his confession in open court at the hearing of June 14, 1972 (Tr. 19-23), and was cross-examined at length by the Government on the details of the hijacking. (Tr. 27-45). Further details were developed by the Court's examination (Tr. 57-62). During the course of his testimony Mr.

Troglen said that, in his mind, he considered himself still then [June 14, 1972] liable for prosecution for the role in the hijacking to which he was confessing (Tr. 36-37). He further testified that an F.B.I. agent had threatened him with prosecution for perjury if he testified at the hearing, but that he was testifying and telling the truth despite that threat. (Tr. 43, 44).

Troglen testified that, following the actual hijacking in Milford, Connecticut, he drove the stolen truck to New York City on a "freeway". He met Sam LaMoncha at an exit in New York and followed him to some other location and the load was switched to another truck by some other people. Then the stolen truck was taken to a location in Queens and abandoned. After that Sam LaMoncha paid Mr. Troglen $5,100 in one hundred dollar bills and took Troglen to the airport from which he flew back to Rochester, his home city. (6/14/72 Tr. 59-62).

John Walsh, a convicted participant in the September 2, 1966 hijacking also testified at the hearing of June 14, 1972. He had not testified at either the DeLaMotte trial or the Jackson trial or on any other occasion. Contrary to several prior oral and written statements, and in anticipation of benefit to himself with regard to his own 22 year sentence (6/14/72 Tr. 75; Second Supplement to Record on Appeal Ex. 2) for his role in this hijacking, Mr. Walsh testified that Glenn DeLaMotte was involved in the crime

(6/14/72 Tr. 75). He admitted that he had written to DeLaMotte in 1970 confirming defendant DeLaMotte's innocence:

> "I am fully aware of your innocence and will sign any affidavit or make any deposition to that effect." (Second Supplement to Record on Appeal, Ex. 3: 8/10/70; see 6/14/72 Tr. 79).

Mr. Walsh further admitted that on the morning of June 14, 1972 just prior to the opening of court, he stated to both the undersigned defense counsel in the presence of appellant's appointed investigator, Mr. Thomas Skinner, that Glenn DeLaMotte was innocent. (6/14/72 Tr. 87). This statement was confirmed by the testimony of Mr. Skinner (6/14/72 Tr. 102-103). He further admitted that he repeated to defense counsel that Mr. DeLaMotte was innocent during the lunch recess of June 14, 1972 just prior to his testimony (6/14/72 Tr. 77-78). He further admitted that in October of 1966 at the West Street Detention Center in New York City he told a fellow inmate, Armando Sacassus, that Mr. DeLaMotte was innocent (6/14/72 Tr. 86087) which conversation was confirmed by the testimony of Mr. Sacassus (6/14/72 Tr. 104-112) and by Mr. Sacassus' affidavit of March 6, 1970 (Second Supplement to Record on Appeal, Ex. 5). When asked on cross-examination to repeat the exact words Mr. Walsh used in the October, 1966 conversation at West Street, Mr. Sacassus testified:

> "Well, he just told me that his friend, Glenn DeLaMotte, who has been a boyfriend of his for years, and he said he had nothing to do with the crime with him." (6/14/72 Tr. 111).

In return for his testimony of June 14, 1972 implicating Mr. DeLaMotte, John Walsh received a promise from the Government of a transfer from the United States Penitentiary at Atlanta, Georgia to some other undisclosed institution and a promise that a letter would be written by the Government on Walsh's behalf to the Parole Board. (6/14/72 Tr. 92-94). Since Mr. Walsh was then serving an "a-2" sentence for his role in this crime (6/14/72 Tr. 74) and was therefore eligible for parole at any time, a favorable letter from the U.S. Attorney's Office in return for his testimony would open the door to the possibility of imminent release from custody.

John David Troglen's confession to the truckdriver role in this hijacking was substantially confirmed by the testimony of Patrick J. O'Shea. (3/6/73 Tr. 193-241). Mr. O'Shea testified that on September 2, 1966 he was contacted by Sam LaMoncha in Brooklyn and was asked to help with the unloading and removal of a load of razor blades which would be arriving that afternoon on a trailer truck to be stolen in Milford, Connecticut. Mr. LaMoncha said that the stolen truck would be driven by a fellow by the first name of David, later known by O'Shea by his full name: John David Troglen (3/6/73 Tr. 195-196) [Mr. Troglen's wife also testified that she called him by the name "David". (6/14/72 Tr. 148)]. Mr. O'Shea agreed to participate by driving a second truck for which he was paid a sum of money by Mr. LaMoncha

(3/6/73 Tr. 196). The details of the crime following the arrival of the stolen truck after it arrived in New York as related by Mr. O'Shea are the same as the details given in the testimony of Mr. Troglen. Mr. O'Shea testified that he first saw the stolen truck on the New England Thruway in the Bronx during the late afternoon of September 2, 1966. At that point Sam LaMoncha was driving his car and O'Shea was driving a second truck. Both trucks then followed the LaMoncha car to a location in Brooklyn (3/6/73 Tr. 226-227). The contents were unloaded from the stolen truck onto the second truck by three men (3/6/73 Tr. 203, 204, 228). The driver of the stolen truck was John David Troglen, not Glenn DeLaMotte (3/6/73 Tr. 214). Thereafter Mr. LaMoncha paid Mr. Troglen $5,100 in one hundred dollar bills and drove him to one of the New York airports for his flight back to Rochester. (3/6/73 Tr. 221-223). Mr. O'Shea and Mr. Troglen next met again when they recognized each other at the penitentiary at Marion, Illinois in 1970 (3/6/73 Tr. 206). Mr. O'Shea first me Mr. DeLaMotte at Marion when they were introduced by Mr. Troglen in 1971 (3/6/73 Tr. 201, 210, 211). Following Mr. O'Shea's 1970 meeting with Mr. Troglen, but before he ever met Mr. DeLaMotte, he signed an affidavit (Second Supplement to Record on Appeal, Ex. 7) admitting his role in the crime, although he had not been arrested or discovered by the authorities.

Although the O'Shea affidavit is undated, he testified that it was signed in 1971 "probably within a period of weeks" after the Troglen confession was signed. Since the Troglen confession (annexed to appellant's original motion for new trial) was signed on January 26, 1971 it appears certain that the O'Shea affidavit was executed before the expiration of the five year statute of limitations for this crime on September 2, 1971.

1. The "Troglen Evidence" should entitle appellant to a new trial.

Appellant argued strenuously in the District Court for the application of the rule of Larrison v. United States, 24 F.2d 82 (7 Cir. 1928) to this claim for new trial on the ground of newly discovered evidence. The Larrison rule, applicable to situations where perjury has been demonstrated, is less stringent from a defendant's point of view than the rule of State v. Berry, 10 Ga. 511 (1851) which is generally followed in the federal courts. Whereas the Berry rule requires, inter alia, that the newly discovered evidence would probably produce an acquittal on retrial, the less stringent Larrison rule requires only a showing that the trial result might have been different without the perjury. In a decision which came down after the filing of defendant's brief in the District Court, however, this Court appears to have rejected the rule of Larrison v. United States, supra, and has held that in all claims for new trial on the ground of newly discovered evidence not involving claims of prosecutorial culpability in suppressing or failing to disclose evidence the proper criteria for evaluation are those of State v. Berry, supra. United States v. Stofsky, 527 F.2d 237 (2 Cir. 1975). Stofsky, however, does not specifically cite or reconcile with United States ex rel Sostre v. Festa, 513 F.2d 1313 (1975) decided six months earlier, where the Larrison test was used (and found not satisfied). In light of the later-decided Stofsky case, appellant will couch his argument in terms of the Berry rule without abandoning any claim that the less stringent Larrison standard should be applied since appellant feels that the newly discovered

evidence he has produced shows that Charles Jackson did give perjured testimony at the DeLaMotte trial and that the District Court was clearly in error in rejecting the newly discovered Troglen evidence.

As adopted in the federal courts in general and in this Circuit in particular the traditional Berry criteria for granting a new trial have been:

(1) The evidence must have been discovered since the trial;

(2) It must be material to the factual issues at the trial, and not merely cumulative nor impeaching the character or credit of a witness; and

(3) It must be of such a nature that it would probably produce a different verdict in the event of a retrial.

United States v. Polisi, 416 F.2d 573, 576-577 (2 Cir. 1969); United States v. Silverman, 430 F.2d 106, 119 (2 Cir. 1970).

To the extent that the second prong of the Berry criteria excludes consideration of newly discovered evidence which is impeaching the character or credit of a witness, United States v. Stofsky, supra, seems to have effected a significant change in the Berry criteria by expressly holding that credibility impeaching factors are now to be considered in assessing claims of newly discovered evidence, at least in the case of perjury:

> "Another problem that does not appear to have been the subject of explicit reported judicial consideration, at least in this circuit, is whether, in considering a motion for a new trial on grounds of perjury, the court should assume that the jury would have had before it the newly-discovered evidence not only for its probative value with respect to the issues but also to demonstrate that the witness had perjured himself with respect to that evidence, the latter being pertinent, of course, for its impeaching value. Put another way, should we, in determining

> whether truthful testimony by the witness would probably have changed the jury's verdict, also assume that the jury would have known that he had lied under oath about the matter? Since the witness's credibility could very well have been a factor of central importance to the jury, indeed every bit as important as the factual elements of the crime itself, see Giglio v. United States, supra, 405 U.S. at 154, 92 S.Ct. 763; Napue v. Illinois, supra, 360 U.S. at 269, 79 S.Ct. 1173; United States v. Seijo, supra, 514 F.2d at 1363-64, we would answer this question in the affirmative. Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness." United States v. Stofsky, supra, 527 F.2d at 246.

As applied to the Troglen evidence, the first two elements of the Berry test require no protracted discussion. They are clearly satisfied. The testimony of Mr. Troglen and Mr. O'Shea was not known to and could not have been appellant at the time of his trial. Mr. DeLaMotte met Mr. Troglen in prison more than a year after his trial. Prior to that he had no knowledge, or way of knowing, that Mr. Troglen was the person who drove the hijacked truck. The statements of John Walsh, given after he had invoked his Fifth Amendment privilege at all earlier proceedings including the DeLaMotte trial, also qualify as "newly discovered" evidence. United States v. Maddox, 444 F.2d 148, 152 (2 Cir. 1971). It is also self-evident that the Troglen evidence--evidence that another person committed the very criminal acts appellant stands convicted of--is material to the factual issue at trial and is not merely cumulative. The only real issue under the Berry test is the requirement that the newly discovered evidence would probably produce an acquittal in the event of a new trial. The District Court found that it would not; appellant asks

this Court, upon careful consideration of all the evidence, to reverse that finding as clearly erroneous.

Appellant recognizes the established precepts that motions for new trials are not favored and should be granted only with great caution. United States v. Stofsky, supra, 527 F.2d at 243, and that in ruling on motions for new trial the District Court judge, particularly if he was also the trial judge, (in this case he was not) has broad discretion in assessing the credibility of the new evidence. United States v. Maddox, supra; On Lee v. United States, 201 F.2d 722 (2 Cir. 1953) cert. den. 345 U.S. 936 (1953). It has been said in a general sense that in hearing a motion for new trial on the ground of newly discovered evidence, the judge sits as a "thirteenth juror" in assessing credibility of that new evidence. United States v. Miller, 277 F.Supp. 200, 209 (D. Conn. 1967). But in the final analysis the test is not actually what the hearing judge believes to be the truth, but rather his assessment of the probable effect of the new evidence in the minds of a new jury. In this regard it is significant that the docket sheet entries (Record on Appeal, A through U) show that the jury which convicted appellant began its deliberations sometime during the afternoon of April 15, 1969. At their request the jurors were excused for the evening at 5:09 p.m. on April 15, and resumed deliberations at about 10 a.m. on April 16. After receiving an answer to an inquiry made by a note at about 10:45 a.m. the jurors continued to deliberate until 3:25 p.m. when they returned a verdict of guilty on both counts against appellant DeLaMotte. Given the fact that Mr. DeLaMotte did not testify on his own behalf, and not a single defense witness was produced

the fact that the jury deliberated more than a day shows that they had at least some serious hesitancy in believing the testimony of Charles Jackson, the only testimony implicating appellant in the crime. It therefore seems clear that another jury hearing the same Jackson testimony but also hearing the confession of John David Troglen and the testimony of Patrick O'Shea confirming the Troglen confession and the DeLaMotte denial now in the record (6/14/72 Tr. 113-114, 117-118) would probably return a verdict of acquittal.

There are factors in the record which greatly enhance the credibility of the Troglen confession. He signed a full sworn confession to his previously undetected role in this crime some seven months before the expiration of the statute of limitations. Since no law enforcement official played any role in the procurement of this affidavit and it was freely and voluntarily executed, it probably would have been sufficient evidence to indict and even to convict Mr. Troglen for his confessed role in the September 2, 1966 hijacking. Not only did Mr. Troglen freely and voluntarily sign this affidavit and make it available for use by appellant DeLaMotte in the District Court for the district where the crime occurred, but also the face of the affidavit indicates and the testimony confirms (6/14/72 Tr. 70-71) that several carbon copies of the affidavit were mailed out in January, 1971 including copies to the "U.S. Attorney General", "U.S. Attorney, New Haven" and "Shick Razor Co., Milford, Connecticut." By the time-honored measure of credibility by the extent to which a statement is against the declarant's penal interest, the Troglen affidavit, copies of which went even to the

victim of the crime and the potential prosecutor, before the expiration of the statute of limitations, is entitled to substantial credibility:

> "These statements were against the informant's penal interest, for he thereby admitted major elements of an offense under the Internal Revenue Code. Section 5205(a)(2), Title 26, United States Code, proscribes the sale, purchase, or possession of unstamped liquor.
>
> "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility..." United States v. Harris, 403 U.S. 573, 583 (1971).

The credibility of the Troglen affidavit and testimony is further bolstered by the prior consistent statement made by Mr. Troglen as described in the statement of Jewell Wesley Walters (Second Supplement to Record on Appeal Ex. 8). In that statement Mr. Walters describes an incident which occurred at the U.S. Penitentiary in Atlanta, Georgia during the latter months of 1969. As Mr. Walters was having some coffee with Mr. Troglen in the prison plumbing shop they were looking through a New York or New Jersey newspaper in which some plumbing fixtures had been wrapped. They came across an article about a sentencing having to do with a hi-jacking of some razor blades. Apparently the story reported the sentencing of DeLaMotte who was sentenced on May 12, 1969. According to the Walters statement, Mr. Troglen then exclaimed "They got DeLaMotte on driving the truck, and I'm the one who drove it", and further "I don't know DeLaMotte but he's the wrong guy." Considering that these prior consistent statements were made spontaneously by Mr. Troglen some months before his transfer to Marion in 1970 where

he met DeLaMotte, they add considerable weight to his later affidavit and testimony.

In rejecting the credibility of the Troglen evidence, the District Court relied on the June 14, 1972 testimony of John Walsh implicating DeLaMotte and on the alibi evidence presented by the Government at the June 14, 1972 hearing wherein it attempted to show that John David Troglen was in Rochester, New York and not in Milford, Connecticut on September 2, 1966 during the time that the hijacking activities took place. (3a)

John Walsh, in the first testimony given by him at any time concerning the events of September 2, 1966, did implicate appellant DeLaMotte in this crime (6/14/72 Tr. 75). He testified under expectation of reward in the form of a transfer to another penal institution and a favorable letter from the Government. Considering that Mr. Walsh, as of June 14, 1972, had served about 3 1/2 years of his 22 year "a-2" sentence, the promise of a favorable letter to the Parole Board provided an overwhelming motive to provide the evidence which he knew the Government wanted. Walsh freely admitted his prior inconsistent statements asserting DeLaMotte's innocence: his statement to Mr. Zeldes, Mr. Jennings and Mr. Skinner on the morning of June 14, 1972 (6/14/72 Tr. 87, 102-103); his statement to Mr. Zeldes during the lunch recess of June 14, 1972 (6/14/72 Tr. 77-78); his statements to Mr. Sacassus at West Street in 1966 (6/14/72 Tr. 86, 87, 111); and his 1970 letter to DeLaMotte (Second Supplement to Record on Appeal Ex. 3). Mr. Walsh on the witness stand insisted that all prior statements were false and that his testimony was true. He attempted to attribute the prior "false" statements to fear. (6/14/72 Tr. 95). The two oral statements of June 14, 1972 were

made while he was in the lockup in the U.S. Marshal's office in New Haven with Mr. Sacassus and Mr. DeLaMotte. Conceivably this environment presented Mr. Walsh with some slight basis for fear of reprisal if he were to make a statement implicating DeLaMotte, (although he did have the protection of the marshal's staff in the immediate vicinity) but that did not mean that he had to make a "false" statement to protect himself. He could have simply refused to say anything at all. In any event there was no possibility of danger to Mr. Walsh when he volunteered the statement of DeLaMotte's innocence to Mr. Sacassus (a totally disinterested party) in 1966 and when he wrote to DeLaMotte from a separate prison in 1970. (Second Supplement to Record on Appeal Ex. 3).

Fear was not the motive for falsification, because there was no real basis for fear, and because the prior statements were not false. John Walsh was strongly motivated to testify as he did by the reward which the Government promised him--a chance at liberty. This hope of reward provided him with an overriding motive to give false testimony at the hearing of June 14, 1972. The fact that his testimony was so tainted by that promise of reward and that his prior statements absolving appellant of guilt were free of any such taint or its equivalent, makes his prior statements far more credible than his testimony. On close analysis, then, the testimony of John Walsh, including the testimony of his several prior oral and written statements does not detract from the credibility of Mr. Troglen's confession and, in fact, the prior Walsh statements add support to the Troglen evidence.

The Walsh recantation of his several earlier statements absolving DeLaMotte is very similar to the situation which existed

in United States v. Mitchell, 29 F.R.D. (D.N.J. 1962). In that case William Mitchell had been convicted of selling narcotics largely on the testimony of an informer, Harold Morgan, who claimed he was present when Mitchell made the sale. After the trial Harold Morgan admitted to two attorneys that he had lied when he testified that Mitchell was the seller of the narcotics, which admissions gave rise to a motion for new trial. At the evidentiary hearing on the motion for new trial Harold Morgan--like John Walsh--recanted on his earlier out-of-court statements and testified again as to Mitchell's guilt. Despite that testimony, Mitchell was granted a new trial under the Berry criteria as set forth in the Third Circuit in United States v. Rutkin, 208 F.2d 647 (1954) on the strength of the out-of-court admissions alone:

> "Thus, after Morgan had recanted subsequent to the trial, and his testimony had been shown to be completely unreliable as to defendant's identity, it would seem most unlikely that the jury would find no reasonable doubt as to Mitchell's guilt. Consequently, the rule actually laid down in Rutkin does not militate against the granting of a new trial to Mitchell, which this Court feels is due 'in the interest of justice.'" 29 F.R.D. at 159.

The District Court also relied on the Government evidence elicited from Mrs. Karen Troglen (6/14/72 Tr. 144-165) for the purpose of attempting to show that her former husband John David Troglen was at the Highland Hospital, Rochester, New York in the morning hours of September 2, 1966 (the day of the hijacking) for the birth of their daughter Donna Lee Troglen on that day. This was offered to rebut Mr. Troglen's testimony that he left Rochester very early on the morning of September 2, 1966 and flew commercially to New York and then proceeded ultimately to Milford, Connecticut

where he participated in the hijacking (6/14/72 Tr. 29-34, 42). Mrs. Troglen testified that Mr. Troglen took her to the hospital in Rochester at about 2-2:30 a.m. on September 2, 1966 (6/14/72 Tr. 149) and that he remained with her for a while before she went into heavy labor. (6/14/72 Tr. 151). She was given a total anesthetic for the birth of the child (Tr. 152). She testified that the baby girl Donna Lee was born on September 2, 1966 at about 10 a.m. (Tr. 151-152). Mrs. Troglen testified that she came out of anesthesia at about 11 a.m. and that Mr. Troglen was in her room at that time for a while and again during afternoon visiting hours (Tr. 152-153).

Mr. Troglen testified that he did take his wife to the hospital during the night of September 1-2, 1966 "late at night" (6/14/72 Tr. 46). He did not recall the time of the child's birth which he described as "early in the morning or late at night" but did recall that he was informed by an unknown doctor that the baby was born and was a girl, and that he immediately left the hospital without seeing his wife or the child to fly to New York City, arriving at about 6 a.m. (6/14/72 Tr. 47, 63). He testified that the time interval from checking his wife into the hospital until he departed from the hospital "wasn't long" (Tr. 64). After driving the hijacked truck from Milford, Connecticut to New York City on the afternoon of September 2, 1966, Mr. Troglen testified that he returned by air to Rochester and probably went to the hospital to visit his wife.

The admissions record of the Highland Hospital for Mrs. Karen Troglen and her newborn female infant were introduced into evidence

as Government Exhibits S and T. (6/14/72 Tr. 32) and were authenticated and explained by the testimony of Mrs. Sharon Insero, an administrative employee of the hospital. (6/14/72 Tr. 124-144). The hospital records show that Mrs. Troglen was admitted to the hospital at 3:38 a.m. and was admitted to the obstetrical ward at 4:15 a.m. on September 2, 1966 (6/14/72 Tr. 128, 133). The admission record shows that John David Troglen signed a consent form on September 2, 1966 (Tr. 133). Exhibit T shows that Baby Girl Troglen was born on September 2, 1966 at "ten of seven--a.m." (Tr. 134).

Mr. and Mrs. Troglen were both testifying from memory about an event which had occurred almost six years earlier. They agreed that he took her to the hospital during the night of September 1-2, 1966 and that he stayed with her a short while before she went into heavy labor. They also agree that Mr. Troglen visited with Mrs. Troglen sometime late in the day of September 2, 1966. They disagree basically on two facts: the time of the birth of the child and Mrs. Troglen's claim that her husband visited with her in the morning shortly after the child was born. Mrs. Troglen's testimony that the child was born at about 10 a.m. is almost certainly wrong. By her own admission she was under total anesthesia at the time of the birth. Her estimate of the time of birth is more than three hours later than the 6:50 a.m. time noted in the hospital record. Having just come out of anesthesia and having remembered the time of birth so poorly, it is entirely possible that her memory concerning the claimed morning visit with her husband after the birth of the child is also faulty. In fact, she admitted to giving a statement to an F.B.I. agent on February 11, 1972 wherein she said that she

did not remember if her husband even stayed at the hospital after bringing her there (6/14/72 Tr. 159). Even the time of birth given in the hospital record may not be correct. The records were not made contemporaneously (6/14/72 Tr. 137) and in at least one very significant detail--the sex of the baby--an erroneous entry was made (6/14/72 Tr. 142-143).

The testimony of Mrs. Troglen must also be assessed in light of her avowed "very strong dislike" for her former husband (6/14/72 Tr. 154) whom she divorced in 1970 (Tr. 146). In fact, they had not gotten along since three days after their marriage (6/14/72 Tr. 55).

Under all the circumstances, then, it is submitted that the evidence concerning the birth of Donna Lee Troglen on September 2, 1966 does not disprove John David Troglen's confession. It is still entirely possible that he flew from Rochester, New York to one of the New York City airports, as he claims, during the morning hours of September 2, 1966.

Considering the Troglen confession first made to Mr. Walters before Mr. Troglen even knew Mr. DeLaMotte and before the statute of limitations had run as verified by the O'Shea testimony and the Walsh out-of-court statements, it is respectfully submitted that a clear showing of probable acquittal on retrial has been made. This is not just a matter of some newly discovered minor detail to attack the credibility of a witness. It is a newly discovered confession of a disinterested third party--the most compelling type of new evidence that a defendant could ever conceivably discover. In United States v. Miller, supra, Judge Blumenfeld did deny a motion for new trial when the newly discovered evidence consisted of the confession of another, but only after finding that (1) the confession

was not newly discovered, 277 F.Supp. at 205; (2) the confession was later twice repudiated, 277 F.Supp. at 209; (3) the confession was not sworn to, id.; (4) the confessor did not testify, id.; and (5) the confession was not against the confessor's penal interest when it was made, 277 F.Supp. at 207-208. From all of these factors Judge Blumenfeld concluded, of the confessor:

> "To say the least, his credibility is doubtful. Obviously he is a person whom a jury would not believe." 277 F.Supp. at 209.

It is significant that none of those Miller criteria apply to the Troglen confession: it was made against penal interest under oath; it has not been recanted; it is newly discovered; and Mr. Troglen did testify. It is further supported by the affidavits and sworn testimony of other witnesses, Mr. O'Shea and Mr. Walters.

It also seems proper for the Court to consider the possibility that the Government would not call Charles Jackson as a prosecution witness in the event of a retrial. It is a matter of record that since the DeLaMotte trial he has been convicted and incarcerated in the State of New York for a felony murder. (Supplement to Record on Appeal Document No. 2, Ex. E). After testifying for the Government in the DeLaMotte trial and before being incarcerated in New York he was released on a non-surety appeal bond and was allowed to remain at liberty from his own 25 year federal sentence for more than two years after the dismissal of his appeal. Under these circumstances his credibility might be so damaged that he would not even be called to testify at a retrial:

> "Consequently, if there were such a trial [a retrial] the sole evidence-if any-of the conversation between Chin Poy and defendant, in which defendant made alleged admissions of his guilt, would be the testimony of Narcotics Agent Lee. But newly discovered evidence-not discoverable until after the trial-makes it clear that

either (a) the government would not use him as a witness, or (b) if it did, his testimony would be so seriously damaged that very probably no jury would believe him." United States v. On Lee, supra, 201 F.2d at 725 (dissenting opinion of Judge Frank).

John David Troglen is an inmate in a federal prison and has been incarcerated for many years of his life in various jails and prisons (6/14/72 Tr. 16-17). The District Court seems to have considered this factor heavily in rejecting his confession, citing United States v. Schoepflin, 442 F.2d 407 (9 Cir. 1971) where a fellow inmate "true robber" confession had been similarly rejected and that rejection was affirmed by the Ninth Circuit in a very brief per curiam opinion. Appellant cites, to the contrary, a recent decision of the Court of Appeals of New Mexico reversing a lower state court and ordering a new trial for a defendant previously convicted of robbery where the newly discovered evidence consisted primarily of the confession of a penetentiary inmate that he had been involved in the robbery of which defendant was convicted along with another person who bore a strong resemblance to the defendant. State v. Chavez, 87 N.M. 38, 528 P.2d 897 (1974).

One aspect of John Troglen's incarceration tends to enhance his credibility. At the time he confessed in open Court on June 14, 1972 to being the driver of the hijacked truck, he was eligible for parole on August 4, 1972 and was scheduled for parole review that very month (June, 1972). Prior to his testimony he had been warned by the F.B.I. that he would be prosecuted for perjury if he testified in support of defendant's motion for new trial (6/14/72 Tr. 43). He did so testify, and he was thereafter indicted for perjury. The fact that he was eligible for parole

so soon after his testimony and that he was warned in advance of a perjury prosecution if he did testify (which would almost certainly prevent a favorable result before the parole board) must be considered as a factor tending to enhance the credibility of the testimony he voluntarily offered.

It is established federal law that the credible confession of another to the commission of a crime for which an accused has been convicted is sufficient ground for a new trial. DeBinder v. United States, 303 F.2d 203 (D.C. Cir. 1962); Casias v. United States, 337 F.2d 354 (10 Cir. 1964). In Casias the new trial motion was denied by the District Court on the ground that it was untimely filed. The Tenth Circuit reversed on that point and remanded the case to the District Court with the advice:

> "No one can doubt that a confession by another party to the crime for which the petitioner has been tried and convicted, if discovered after conviction, would be grounds for a new trial. The integrity of the confession is a matter within the province of the trial Court,..." 337 F.2d at 356.

For all these reasons, then, it is submitted that even under the Berry test, the Troglen confession and the other evidence corroborating that confession constitute newly discovered evidence entitling appellant to a new trial.

B. The Jackson Evidence

Appellant's motion for a new trial on the ground of newly discovered evidence is further premised on his post-trial discovery of certain facts concerning the status of co-defendant and prosecution witness Charles Jackson, which facts raise the possibility that Mr. Jackson received far greater benefit or reward for his testimony against appellant DeLaMotte than the benefit or reward disclosed by the Government or by Mr. Jackson during the DeLaMotte trial. The suppression of the full agreement between the Government and Mr. Jackson is urged as a ground for a new trial under the rule of Giglio v. United States, 405 U.S. 150 (1972). All the facts concerning this claim have been set forth earlier in the Statement of the Case, supra and will be summarized briefly here:

1. Background Re Jackson

Mr. Jackson was convicted for his role in this hijacking on July 3, 1968 at the conclusion of a trial by jury. Mr. Jackson was an indigent, represented by appointed counsel. He was incarcerated before and during his own trial in lieu of posting a $10,000 bond. Immediately upon his conviction his bond was increased to $50,000 and he remained in custody. He was sentenced on November 29, 1968 to 25 years on the kidnapping count and a concurrent sentence of five years on the Dyer Act count-both sentences being imposed under 18 U.S.C. 4208(a)(2). He appealed his conviction

to this Court on December 5, 1968. His motion for bail pending appeal was denied on December 19, 1968 with a reported opinion of January 6, 1969 in which it was concluded that he posed "a distinct danger to other persons and to the community", United States v. Jackson, supra 297 F.Supp. 601, 603 (D. Conn. 1969). In April of 1969, Mr. Jackson testified as a prosecution witness at the DeLaMotte trial and provided the only evidence linking Mr. DeLaMotte to this offense.

2. Agreement re Jackson Disclosed at DeLaMotte Trial.

The full testimony concerning the agreement between the Government and Mr. Jackson has been quoted, supra at pp. 15 and 16 of this brief. As brought out primarily in the direct examination conducted by then Assistant United States Attorney Paul Sherbacow, Mr. Jackson disclosed an agreement with the Government whereby, in return for his testimony, he was promised that a bond in an unspecified amount would be set for his release on bail pending the outcome of his own appeal, and that, if his conviction were affirmed on appeal, the Government would write a letter advising the parole board of his testimony for the Government which letter would recommend leniency with regard to Jackson's 25 year sentence. When asked by Mr. Sherbacow what that would mean, Mr. Jackson replied "That I would get a reduction of sentence." (4/2/69 Tr. 77). Mr. Sherbacow offered no other statement or other evidence of his

agreement with Mr. Jackson. There was absolutely no mention of any arrangement whereby Mr. Jackson would be allowed to remain at liberty if and when this Court affirmed his conviction.

3. Newly Discovered Evidence re Jackson.

On April 23, 1969, one week after Mr. DeLaMotte's conviction, Mr. Jackson, an indigent, was released on a non-cash, non-surety bond of $25,000. He was released to the custody of a private individual on the conditions that he report weekly to his probation officer and that he prosecute his appeal with diligence. (Supplement to Record on Appeal, Document No. 2, Ex. C). His release was, in effect, a release on his own recognizance. His indigency made the amount of the non-cash, non-surety bond an irrelevant detail. Thereafter, Mr. Jackson's appeal was not prosecuted with diligence and it was dismissed for frivolousness on January 18, 1972. Mr. Jackson was still at liberty at the time of the June 14, 1972 hearing on the pending motion which fact was known to the Government (6/14/72 Tr. 8). At the March 6, 1973 hearing the Government conceded that Mr. Jackson was still not in federal custody and, in fact, the Government did not know where he was (3/6/73 Tr. 182-183; Supplement to Record on Appeal, Document No. 2 Ex. 6). Finally in July of 1974 the Government disclosed to defendant that Mr. Jackson had been arrested on March 11, 1974 and was then incarcerated at a State of New York penal institution on a charge of manslaughter

and felony-murder (Supplement to Record on Appeal, Document No. 2, Ex. E). The newly discovered facts disclose, then, that Charles Jackson was released virtually on his own recognizance one week after appellant DeLaMotte's conviction; that he was not taken into federal custody to continue serving his 25 year sentence when his own appeal was dismissed; that he was not taken into federal custody at any time after the DeLaMotte trial and that he remained at liberty for fourteen months after his appeal was dismissed and for almost twenty two months after appellant DeLaMotte at the hearing of June 14, 1972 raised the issue of Mr. Jackson's continuing liberty.

4. Entitlement to New Trial.

It seems clear beyond a doubt that appellant is entitled to a new trial if he is correct that the most unusual liberty enjoyed by Mr. Jackson after the dismissal of his appeal of his own conviction and sentence resulted from an undisclosed agreement with the Government. Brady v. Maryland, 373 U.S. 83 (1963), Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972), United States v. Keogh, 391 F.2d 138 (2 Cir. 1968); United States v. Miller, 411 F.2d 825 (2 Cir. 1969). As this Court recently noted in United States v. Stofsky, supra:

> "The intentional governmental suppression of evidence useful to the defense at trial will mandate a virtual automatic reversal of a criminal conviction." 527 F.2d at 243; and
>
> "The inadvertent but negligent failure on the part of a prosecutor to furnish to the defense evidence

> in the prosecutor's control that is of an exculpatory or impeaching nature would loosen the standard of review relative to newly discovered evidence and require a reversal 'if there is a significant chance that this added item could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'" Id.

The real issue here is whether or not Jackson's liberty after his own conviction became a final judgment resulted from a Government promise. The Government has represented that there was no such promise (6/14/72 Tr. 9; 3/6/73 Tr. 183) but cannot apparently offer any other explanation for this liberty which the District Court characterized during the hearing as "highly unusual." (3/6/73 Tr. 183). The District Court found, however, that appellant had failed to prove the existence of any undisclosed promise to Mr. Jackson or agreement with him. (2a; 3a). The District Court cited a Fifth Circuit footnote, Reagor v. United States, 488 F.2d 515, 516, n. 5 (5 Cir. 1973) which does indicate that the fact of a reward is not proof of a promise of reward but only 'inconclusively evidentiary."[6] Appellant nonetheless asks this Court to reverse the District Court by inferring, from the particular facts of this case, that there was an undisclosed promise of reward. The highly unusual nature of the reward enjoyed by Mr. Jackson demands an explanation more convincing than a mere denial of a promise--an explanation that has not been made by the Government.

---

6. See also, n. 3 where the Court described the reward as "at least evidentiary of the alleged promise."

Although not directly in point appellant cites this Court to Kyle v. United States, 297 F.2d 507 (2 Cir. 1961) and United States v. Consolidated Laundries Corporation, 291 F.2d 563 (2 Cir. 1961) where this Court, in the absence of any other explanation, was willing to infer that certain papers were in the prosecutor's file at the time of trial from the fact that they were found in his file some time after the trial.

It is also suggested that Mr. Jackson's highly unusual liberty may properly be the subject of this Court's supervisory power. See, United States v. Miller, supra, 411 F.2d 825, 832 and Kyle v. United States, 297 F.2d 507, 514 (2 Cir. 1961). As this Court recently noted, its supervisory power:

> "...is not limited to the admission or exclusion of evidence, but may be exercised in any manner necessary to remedy abuses of a district court's process." United States v. Toscanino, 520 F.2d 267, 276 (2 Cir. 1975).

Appellant also relies on the Sixth Amendment in his claim for a new trial because of the newly discovered Jackson evidence. The suppression of the full understanding between the Government and Charles Jackson denied defendant effective representation of counsel. United States v. Miller, supra, 411 F.2d 825, 832.

II. THE INSTRUCTION TO THE JURY ON APRIL 2, 1969 DURING THE TESTIMONY OF GOVERNMENT WITNESS CHARLES JACKSON WAS ERRONEOUS, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND UNDER THE SIXTH AMENDMENT.

On April 2, 1969 during the direct examination of Government witness Charles Jackson, immediately after his testimony that he had been promised bail during the pendency of his own appeal, the trial Court interrupted and gave a spontaneous instruction to the jury which is quoted in its entirety, supra at p. 14 of this brief. The clear import of that instruction was that the District Court no longer had power or jurisdiction to order or approve an appeal bond for Mr. Jackson since his appeal to the Second Circuit had already been filed:

> "Secondly, once the appeal is taken, it is the exclusive jurisdiction, with respect to the matter of bond appeal, of the Appellate Court. In this case, the United States Court of Appeals for the Second Circuit." (4/2/69 Tr. 72).
>
> "This Court no longer has jurisdiction." (4/2/69 Tr. 72).

The instruction as given was erroneous, and, under the circumstances of this trial that error amounted to a denial of due process, entitling appellant DeLaMotte to a new trial.

A. The Instruction Was In Error.

The error in the instruction to the jury is best demonstrated by the fact that on April 23, 1969, just one week after the DeLaMotte conviction, the trial Court entered an order (Supplement to Record on Appeal, Document No. 2, Ex. C) releasing Mr. Jackson on a no-cash non-surety bond in the amount of $25,000 provided he complied with certain conditions. That "Order Specifying Conditions of Release Pending Appeal" was signed by the trial Court as "Chief Judge, United States District Court". The Court of Appeals did not issue that order or a simi

order. There is no indication in the record that the Court of Appeals had anything to do with Mr. Jackson's release.

After filing his notice of appeal on December 5, 1968 Mr. Jackson moved on several occasions for bond pending appeal. In ruling on one such request the trial Court correctly stated the law, which statement directly contradicts the jury instruction given some three months later at the DeLaMotte trial. The earlier, and correct, statement was:

> "The Court is authorized to order that defendant, who has been convicted and has filed notice of appeal be detained without bond pending appeal. 18 U.S.C. §3148." United States v. Jackson, supra, 297 F.Supp. at 603.

Release on bail after conviction is, and was in 1969, governed by 18 U.S.C. §3148 and Rule 9 of the Federal Rules of Appellate Procedure which provide that application for bond pending appeal can and should be made in the first instance in the District Court, even if a notice of appeal has been filed. The notes of the Advisory Committee on Appellate Rules are directly in point:

> "Subdivision (b). This subdivision regulates procedure for review of an order respecting release at a time when the jurisdiction of the court of appeals has already attached by virtue of an appeal from the judgment of conviction. Notwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. §3148 and FRCrP 38(c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court."

Reported cases in the District of Connecticut are in accord. United States v. Jackson, supra; United States v. Asparro, 300 F. Supp. 822 (D. Conn. 1969); United States v. Ursini, 276 F.Supp. 993 (D. Conn. 1967).

B. Violation Of Due Process

Charles Jackson, an admitted accomplice, was the Government's chief witness in the DeLaMotte trial. He provided the only evidence implicating DeLaMotte. None of the eyewitnesses who testified could identify Mr. DeLaMotte as a participant in the crime. The truckdriver-victim could not identify him. The credibility of Charles Jackson's accomplice testimony naming Mr. DeLaMotte as the driver of the hijacked truck was the crucial issue of the trial. The erroneous instructions to the jury about the District Court's power to approve the promise of reward as described by Mr. Jackson, emphasized by its immediate delivery to the jury while Mr. Jackson was still testifying on direct examination, went to appellant's fundamental right to a fair trial and amounted to a denial of due process of law.

The purpose of bringing out promises of reward made by a prosecution witness, of course, is to lay the groundwork for an argument to the jury that the witness has falsified his testimony in the hope of achieving the reward which has been promised to him. When the jury is told erroneously--with the witness still on the stand--that the power to grant the expected reward lies not within the power of the trial Court but rather witn an appellate court, the credibility-impeaching value of the promise of reward is largely destroyed. In the mind of the jury from that point forward, Charles Jackson's only hope of bond on appeal lay in his ability to convince a distant "higher court" that he was entitled to it. The connotation which easily flows from this statement is that the promised reward of bond on appeal would be very difficult for Mr. Jackson to

actually achieve, and that the promise was therefore of little significance. His motivation to falsify was minimized. Based on the instruction given, a juror would have no basis whatsoever for anticipating what actually happened: Charles Jackson was released on bond pending appeal by order of the District Court just one week after the conclusion of the DeLaMotte trial. Not only was the credibility-impeaching value of the promise destroyed by the erroneous statement that only the Court of Appeals could approve the bond, but the instruction also deprived appellant of a fair trial in that it failed to apprise the jury of the weight which the Court (the District Court or the Court of Appeals) would probably give to a Government recommendation on the subject of bond on appeal. See e.g. United States v. Asparro, supra; Cf. United States v. Edson, 487 F.2d 370 (1 Cir. 1973) (favorable recommendation of prison officials).

In Giglio v. United States, supra, as in the present case, the Government's case depended entirely on the credibility of a single accomplice witness. At least in that situation, it is now clear from the teaching of Giglio that wrongful suppression of a promise of reward to such a witness is a violation of due process of law. The same reasoning must be extended to judicial statements which erroneously minimize in the minds of the jurors the motivation impact of a promise which is disclosed. As the Court noted in United States v. Persico, 305 F.2d 534 (2 Cir. 1962) in reversing a conviction and granting a new trial:

> "The interruptions and ensuing colloquies between the judge and counsel before the jury were particularly damaging because they were primarily related to statements concerning Vacarro's credibility and possible motivation to bear false witness. The undoubted effect

was to convince the jury that the trial judge was unimpressed by the attacks upon Vacarro's credibility." 305 F.2d at 537.

The constitutional violation lies not only in the manner or source of the deprivation, but in the fact of depriving an appellant of the ability to impeach the credibility of the witness:

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, supra, 360 U.S. at 269.

This Circuit, even before Giglio, has recognized the extraordinary scrutiny which is called for in matters concerning the credibility of an accomplice-witness upon whose sole testimony a conviction rests:

> "The Government's case rested entirely upon the uncorroborated testimony, inconsistent with his earlier testimony in some respects, of an accomplice and conspirator who had the strongest possible reasons to become a Government witness. We must therefore scrutinize any claimed error with extreme care since there is a grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor." United States v. Persico, supra, 305 F.2d at 536.

Upon such scrutiny, the instruction given to the jury during the testimony of Charles Jackson cannot be approved, and a new trial is the appropriate remedy.

C. Denial Of Effective Representation By Counsel

The instruction complained of also had the effect of denying appellant DeLaMotte effective representation by counsel in that a significant device for attacking the credibility of the chief prosecution witness was erroneously minimized by the trial Court's statement. See United States v. Miller, supra, 411 F.2d 825, 833.

III. THE INDICTMENT OF APPELLANT DELAMOTTE WAS BASED ON IMPERMISSIBLE USE OF HEARSAY EVIDENCE.

Appellant raised this issue orally at the hearing of June 14, 1972 (6/14/72 Tr. 178) and again at the hearing of March 6, 1973 (3/6/73 Tr. 189-192). The Government complied with DeLaMotte's motion of April 12, 1973 for production of the grand jury minutes by responding that no grand jury minutes for the date of appellant's indictment can be located in the Clerk's Office or in the Federal Records Center. (Supplement to Record on Appeal, Document 2, Ex. A and B). From the present status of the record, then, the nature of the evidence submitted to the grand jury cannot be determined directly. It is fairly clear, however, that hearsay evidence was used to indict Mr. DeLaMotte. At trial, the only evidence presented by the Government linking Mr. DeLaMotte to this crime was the testimony of Charles Jackson. Presumably, then, his testimony was the only available evidence on that crucial point. But Mr. Jackson obviously did not testify in person before the very grand jury which also indicted him, especially since he thereafter entered a plea of not guilty and stood trial as to his own involvement in the crime. At the conclusion of Mr. Jackson's direct examination at the DeLaMotte trial, and even prior thereto, several writings were produced under the Jencks Act, or as matters relating to his credibility. Before his cross-examination there was an extensive Jencks Act hearing in the absence of the jury (4/3/69 Tr. 75-143) at which several F.B.I. agents and Charles Jackson testified. There is no mention or disclosure of any testimony by Mr. Jackson before the grand jury and it therefore seems clear that he did not appear as a grand jury witness. If he had, the fact of that testimony, or

grand jury minutes, would certainly have been disclosed or produced as a result of the Jencks Act hearing.

It also seems that Mr. Jackson was not cooperating with the Government at the time of the grand jury proceedings because of his refusal to sign the written confession which F.B.I. agents submitted to him on September 13, 1966 (4/3/69 Tr. 77-143).

Since Mr. Jackson did not appear before the grand jury and since he apparently was the source of the only evidence implicating appellant DeLaMotte, the conclusion is inescapable that appellant's indictment was obtained as a result of hearsay evidence.

In United States v. Esteppa, 471 F.2d 1132 (2 Cir. 1972), this Court, after a long series of warnings to attorneys for the Government as to the improper use of hearsay evidence before the grand jury, see United States v. Umans, 368 F.2d 725, 730 (2 Cir. 1966); and United States v. Arcuri, 282 F.Supp. 347, 350 IE.D. N.Y.), aff'd, 405 F.2d 691 (2 Cir. 1968), dismissed an indictment when the Government needlessly relied on hearsay before the grand jury:

> "The many opinions in which we have affirmed convictions despite the government's needless reliance on hearsay before the grand jury shown how loathe we have been to open up a new road for attacking convictions on grounds unrelated to the merits. We have been willing to allow ample, many doubtless think too ample, latitude in the needless use of hearsay, subject to only two provisos - that the prosecutor does not deceive grand jurors as to 'the shoddy merchandise they are getting so they can seek something better if they wish,' United States v. Payton, supra, 363 F.2d at 1000 (dissenting opinion), or that the case does not involve 'a high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted.' United States v. Leibowitz, supra, 420 F.2d at 42; United States v. Arcuri, 282 F.Supp. 347, 350 (E.D. N.Y.), aff'd, 405 F.2d 691 (2 Cir. 1968). We had hoped that, with the clear warnings we have given to prosecutors, going back to United States v. Umans, 368 F.2d 725, 730 (2 Cir.

1966), cert. granted, 386 U.S. 940, 87 S.Ct. 975, 17 L.Ed.2d 872 cert. dismissed as improvidently granted, 389 U.S. 80, 88 S.Ct. 253, 19 L.Ed.2d 255 (1967), and the assurances given by United States Attorneys, see United States v. Arcuri, supra, 405 F.2d at 693 & n. 4, a reversal for improper use of hearsay before the grand jury would not be required. Here the Assistant United States Attorney, whether wittingly or unwittingly - we prefer to think the latter, clearly violated the first of these provisos. We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performance by their assistants." 471 F.2d at 1137.

The preference for live testimony before grand juries is not limited to this Court. Other courts have long recognized the superiority of live testimony. In Re Grand Jury Investigation of Banana Industry, 214 F.Supp. 856, 860 (D.Md. 1963); United States v. Anzelmo, 319 F.Supp. 1106, 1116 (E.D. La. 1970).

Although the actual record of testimony presented to the grand jury is not available, it has been demonstrated that the evidence against appellant DeLaMotte must have been entirely hearsay. Appellant DeLaMotte having so demonstrated, the burden of showing full compliance with the Esteppa rule should now fall on the Government:

"First, there was an affirmative duty on the part of the prosecutor under the circumstances here to enlighten the grand jurors as to the hearsay quality of the evidence they were receiving." United States v. Gallo, 394 F.Supp. 310, 315 (D. Conn. 1975).

The District Court concluded that appellant DeLaMotte had failed to show that the grand jury was misled by the hearsay evidence submitted. (5a) Appellant contends, and asks this Court to rule, that the element of misleading the grand jury must be presumed because the records of the grand jury testimony are missing.

This Court has held that the proper manner of evaluating an Esteppa claim of illegal use of hearsay before a grand jury is for the trial judge:

> "...to examine the grand jury minutes in camera to determine whether or not the grand jury was misled into believing it was given eye-witness testimony when in fact it was not." United States v. Ramirez, 482 F.2d 807, 812 (2 Cir. 1973).

Appellant, then, claims that having demonstrated that only hearsay evidence was presented to grand jury, he had a right to in camera inspection of the grand jury notes in the District Court--a right which has been frustrated and denied through no fault of his own because the grand jury notes have been lost. Since the Government has the affirmative duty of showing that it did not mislead the grand jurors in its presentation of the hearsay evidence, and the Government has not met that affirmative duty, the indictment should be dismissed.

By close analogy, it is well established that the inability of a convicted defendant to obtain a transcript of his District Court trial through no fault of his own must result in a new trial; otherwise, his right to appeal would be frustrated. Hardy v. United States, 375 U.S. 277 (1964); United States v. Acilus, 425 F.2d 816 (5 Cir. 1970). A fortiori should a criminal accused--even a convicted defendant--enjoy the benefit of a similar rule when his claim relates to the constitutionally guaranteed right to indictment by grand jury, a right which this Court in Esteppa so aptly characterized:

> "When the framers of the Bill of Rights directed in the Fifth Amendment that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,' they were not engaging in a mere

verbal exercise. The importance of avoiding undue reliance upon hearsay before a grand jury is heightened by this circuit's view that an indictment constitutes a finding of probable cause and avoids the need for a preliminary hearing under F.R.Cr.P. 5(c)." United States v. Esteppa, supra, 471 F.2d at 1136.

Conclusion

For all the reasons advanced herein, the ruling of the court below should be--and appellant requests that it be--reversed and remanded to the District Court for a new trial.

Respectfully submitted,

Jacob D. Zeldes

Alfred J. Jennings, Jr.

Zeldes, Needle & Cooper
A Professional Corporation
333 State Street
P.O. Box 1740
Bridpeport, Connecticut 06601

Attorneys for appellant
Glenn Walter Alexander DeLaMotte

Dated: September 16, 1976

C E R T I F I C A T I O N

This is to certify that a copy of the foregoing was mailed via First Class Mail to:

Peter A. Clark, Esquire
Assistant United States Attorney
U.S. Post Office Building
141 Church Street
New Haven, Connecticut 06505

Dated at Bridgeport, Connecticut this 16th day of September, 1976.

Jacob D. Zeldes

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
V.	:	CRIMINAL NO. 11,829
	:	
GLENN WALTER ALEXANDER DE LA MOTTE	:	
	:	

RULING ON DEFENDANT'S MOTION FOR A NEW TRIAL

On April 16, 1969, the petitioner Glenn De La Motte, was convicted of kidnapping and interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. §§1201(a) and 2312, after a lengthy trial before a jury and the Honorable William H. Timbers, Chief Judge (now Circuit Judge). The following month he was sentenced to concurrent terms of thirty years and five years to run consecutively to the sentence he was serving at the time for bank robbery. The convictions were affirmed on appeal, 434 F.2d 289 (2 Cir. 1970), and certiorari was denied, 401 U.S. 921 (1971).

Thereafter, the petitioner filed a pro se motion for a new trial, the Court appointed counsel to represent him,[1/] an amended application for a new trial was filed, several hearings were conducted, and comprehensive briefs have now been submitted.

I.

At petitioner's 1969 trial, the government produced evidence that the petitioner and two accomplices, Charles Jackson and John Walsh, hijacked a truck transporting a cargo of razor blades in Milford, Connecticut. The truck driver

was taken to a wooded area near Alpine, New Jersey, and tied to a tree. When the driver freed himself, he reported the incident to the local police. Subsequently, Jackson, Walsh and the petitioner were apprehended. Two eyewitnesses to the crime and the driver identified Jackson and Walsh as the persons involved, but they were unable to identify the petitioner. However, after Jackson was convicted on July 3, 1968, following a jury trial and was sentenced to a term of 25 years, he became the government's chief witness in the petitioner's trial and was largely responsible for the successful prosecution of the case. Walsh in the meantime pled guilty and was committed for a period of 22 years.

II.

In the instant application for a new trial, pursuant to Rule 33, Fed. R. Crim. P., it is first contended that one John David Troglen, and not the petitioner, was the third man involved with Jackson and Walsh in the crimes. At the hearing before this Court, Troglen, a fellow inmate of the petitioner's at Marion Penitentiary, testified that on September 1, 1966, one Sam La Moncha arranged for Troglen to be a participant with Jackson and Walsh in the hijacking. The following day the truck was seized and, according to Troglen, he drove the vehicle to New York for which he was paid the sum of $5,100 by La Moncha. Troglen's testimony was supported by Patrick O'Shea, also incarcerated at the Marion institution. He explained that on September 2, 1966, he was driving a truck which received a load of razor blades from another truck hijacked earlier in the day in Milford, Connecticut. He further stated that Troglen, and not the petitioner, was the driver of the stolen vehicle and that he observed as La Moncha paid

Troglen over $5,000. The petitioner also called Walsh as a witness who, prior to the hearing, had written a letter to the petitioner asserting the latter's innocence. Under oath at the hearing, however, Walsh testified that the petitioner and not Troglen was his accomplice in the crime.

In the opinion of the Court, the testimony of Troglen and O'Shea is unworthy of belief.[2/] Their demeanor and behavior on the stand, without more, created grave doubts in the Court's mind that their evidence was credible. In addition, however, Walsh's refusal to involve himself in the concocted tales, coupled with the government's rebuttal evidence, provided convincing proof that their stories were false. The official records of the Highland Hospital in Rochester, New York, and the testimony of Mrs. Karen Troglen irrefutably established that Troglen was in Rochester at the times he claimed he was in New Jersey and Connecticut planning and executing the crimes in question. Under these circumstances, the petitioner's request for a new trial based on the so-called "Troglen newly discovered evidence" must be rejected. United States ex rel. Sostre v. Festa, 513 F.2d 1313 (2 Cir. 1975); United States v. Schoepflin, 442 F.2d 407 (9 Cir. 1971).

The petitioner next asserts that he is entitled to a new trial because the government prosecutors at trial failed to disclose a promise of post-trial release made to Jackson in exchange for his testimony. Cf. Giglio v. United States, 405 U.S. 150, 154-155 (1972); Reagor v. United States, 438 F.2d 515, 517 (5 Cir. 1973); Kyle v. United States, 297 F.2d 507, 512 (2 Cir. 1961). The short answer to this contention is that the petitioner failed to elicit any evidence of a benefit or reward offered to Jackson that was not disclosed during the

trial. Reagor v. United States, supra at 516 n.5; compare United States ex rel. Washington v. Vincent, 525 F.2d 262, 267 (2 Cir. 1975); United States v. Rosner, 516 F.2d 269, 273 (2 Cir. 1975). The representations of the government's trial attorneys that there was no such undisclosed bargain stand uncontroverted on the record; and, therefore, the petitioner's arguments constitute nothing more than bare speculation.

III.

Petitioner also moves, pursuant to 28 U.S.C. §2255, to vacate his sentence and set aside the judgment of conviction on alternative grounds that 1) certain instructions to the jury by the trial court were erroneous and 2) the indictment was procured in violation of the standards established in United States v. Estepa, 471 F.2d 1132 (2 Cir. 1972).

At the outset it is appropriate to note that §2255 may not serve as a vehicle to appeal alleged errors at trial unless the claimed errors are fundamental ones which resulted in a complete miscarriage of justice. Davis v. United States, 417 U.S. 333, 346 (1974); Sunal v. Large, 332 U.S. 174, 178, (1947). In the instant case, none of the questions now before the Court was raised on petitioner's appeal although each was a matter of record at the trial stage. Petitioner's present complaints hardly rise to constitutional dimensions requiring relief under §2255 where none was sought on appeal. Cf. United States v. Wright, 524 F.2d 1100, 1102 (2 Cir. 1975).

In any event, the claims are without merit. First, even assuming the trial judge incorrectly stated to the jury that Jackson's bond on appeal was a matter for the appellate court rather than the District Court, petitioner incurred no

prejudice. The prosecutor's promise with respect to Jackson's bond was revealed to the jury and it seems clear that the jury's resolution of the charges was not affected by the purely technical distinction as to what court had jurisdiction to fulfill the promise. Cf. United States v. DeSanio, 456 F.2d 644, 647 (2 Cir.), cert. denied, 406 U.S. 933 (1972). Second, the judge's instructions concerning accomplice testimony [3/] comported generally with charges on the subject which have been deemed adequate and sufficient. See United States v. Tyers, 487 F.2d 828 (2 Cir. 1973); United States v. Projansky, 465 F.2d 126 (2 Cir.), cert denied, 409 U.S. 1006 (1972); United States v. Vita, 294 F.2d 524 (2 Cir. 1961), cert. denied, 369 U.S. 823 (1962). Finally, there has been no showing that the grand jury was misled by the hearsay evidence submitted by the prosecutor in obtaining the indictment. Cf. United States v. Costello, 350 U.S. 359 (1956).

Accordingly, the motion for a new trial in all respects is denied.

Dated at New Haven, Connecticut, this 2nd day of June, 1976.

Robert C. Zampano
United States District Judge

FOOTNOTES

1/ The Court acknowledges with appreciation Attorney Jacob Zeldes conscientious and exceptionally thorough representation of the petitioner's cause before this Court.

2/ Troglen was indicted for perjury as a result of his testimony before this Court. However, the indictment was dismissed due to the government's failure to be ready for trial within the period specified in the speedy trial rules of this District.

3/ The trial court instructed the jury as follows:

> ". . .an accomplice does not become incompetent as a witness because of his participation in the crime charged. On the contrary, if the only evidence on some or all of the essential elements of a crime is the testimony of an accomplice alone, it may be of sufficient weight to sustain a verdict of guilty if believed by the jury, even though not corroborated or supported by other evidence . . . [T]he jury should keep in mind that the unsupported testimony of an accomplice is always to be regarded with caution and weighed with great care. In the last analysis, no independent, supporting evidence is absolutely necessary in this regard, but you should not convict a defendant upon the unsupported testimony of an accomplice unless you believe that unsupported testimony beyond a reasonable doubt. An accomplice is entitled to the same consideration and must have his testimony measured in the same way as any other witness including his motive for testifying as he did."